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Supreme Court of the United States

October Term, 1956

No. 107

KINGSLEY BOOKS, INC., LOUIS FINKELSTEIN, doing business as TIMES BOOK SHOP and MARTIN KLEINBERG,

Appellants,

—v.—

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLANT

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Opinions Below

The Trial Court wrote an opinion which is reported in 208 Misc. 150. The Court of Appeals wrote an opinion which is reported in 1 N. Y. (2d) 177.

Matters Related to Jurisdiction

(a) Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C., Section 1257(2).

(b) Timeliness

The date of the judgment of the Court of Appeals is April 27, 1956, and its entry is the same date. The date of filing of the notice of appeal in the Office of the Clerk of the Supreme Court, New York County, State of New York is May 8, 1956.

(c) Probable jurisdiction was noted January 14, 1957.

Statute Involved

Section 22-a of the Code of Criminal Procedure (L. 1941, ch. 925), as amended by L. 1954, ch. 702, effective July 1, 1954, reads as follows:

"§22-a. OBSCENE PRINTS AND ARTICLES; JURISDICTION.

The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints and articles, as hereinafter specified:

1. The chief executive officer of any city, town or village or the corporation counsel, or if there be none, the chief legal officer of any city, town, or village, in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecedent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains an article or instrument of indecent or immoral use or purports to be for indecent or immoral use or purpose; or in any other respect defined in section eleven hundred forty-one of the

penal law, may maintain an action for ~~an~~ injunction against such person, firm or corporation in the Supreme Court to prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure or image or any written or printed matter of an indecent character, herein described or described in section eleven hundred forty-one of the penal law.

2. The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

3. In the event that a final order or judgment of injunction be entered in favor of such officer of the city, town or village and against the person, firm or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff of the county in which the action was brought any of the matter described in paragraph one hereof and such sheriff shall be directed to seize and destroy the same.

4. In any action brought as herein provided such officer of the city, town or village shall not be required to file any undertaking before the issuance of an injunction order provided for in paragraph two hereof, shall not be liable for costs and shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm or corporation sought to be enjoined.

5. Every person, firm or corporation who sells, distributes, or acquires possession with intent to

sell or distribute any of the matter described in paragraph one hereof, after the service upon him of a summons and complaint in an action brought by such officer of any city, town or village pursuant to this section is chargeable with knowledge of the contents thereof."

Question Presented

The sole question presented is the constitutional validity under the Federal Constitution of Section 22-a, Code of Criminal Procedure of the State of New York. Appellants claim that this statute violates due process in that it is a prior restraint upon publications as protected by the Fourteenth Amendment to the Constitution of the United States which incorporates the guarantees of free speech and press found in the First Amendment to that Constitution.

Statement of the Case

The appellee's predecessor,* as Corporation Counsel of the City of New York instituted this action pursuant to said statute to restrain the appellants and others from distributing the issues, present and future, of a publication entitled, "Nights of Horror." The complaint (R. 8) alleged the authority of the then plaintiff to institute the suit under the statute. It also alleged that the appellants and others have in their possession certain issues of the publication in question "as a person who sells, or is about to sell, or has in his possession, or distributes, or is about

* The predecessor is Adrian P. Burke. After he resigned to become a judge of the New York Court of Appeals, the appellee was substituted in his stead (R. 73n).

to distribute a publication entitled "Nights of Horror". The complaint further requested judgment that the appellants be directed to surrender all copies of said publication in their possession to the sheriff and that said publications be destroyed. The ground for the action was the allegation that these publications are obscene.

The plaintiff, by order to show cause, dated September 10, 1954 (the same date the complaint was verified), containing a stay moved for a temporary injunction to restrain appellants from distributing the aforesaid publication. The papers were served on September 10, 1954 and returnable September 14, 1954. The application was granted and an order was signed on September 22, 1954 restraining the appellants from acquiring for selling and from distributing any of the publications during the pendency of the action (R. 39).

The answer of the appellants raised the issue of the constitutionality of the statute (R. 10).

The answer which was subsequently amended at the trial, admitted that appellants had in their possession for sale or distribution the aforesaid issues of the publication.

Upon the trial by motion to dismiss the complaint the issue of unconstitutionality was again raised (Record, p. 40, and renewed, R. 41). The trial justice thereupon considered the question of constitutionality that was raised, and made his decision in a lengthy opinion on that issue in which he upheld the constitutionality of the statute (R. 44).

Thereupon, he rendered a judgment, permanently enjoining the appellants and others from "distributing, sell-

ing or acquiring possession of Volumes I and II and Issues 3 to 14, inclusive of the volumes of the publication entitled "Nights of Horror". He further directed that the said publications be surrendered by the appellants to the Sheriff of the City of New York to be destroyed by him.

Thereafter, an appeal was taken directly to the Court of Appeals from the judgment of trial court, pursuant to New York practice, because the sole issue was the unconstitutionality of the statute (Section 588, Sub. 4, C. P. A.). The Court of Appeals ruled on that sole issue on the merits, and held that the law is constitutional. In affirming the judgment, the Court of Appeals was unanimous (Judge Burke, not sitting)—three judges voting to affirm on the basis of one opinion and three judges for the reasons set forth in another opinion.

Summary of Argument

1. All publication are entitled to protection from previous restraint.

2. Distribution of a publication is protected equally with publishing.

3. Censorship by a court, even after trial, with procedural safeguards, violates the Constitution of the United States.

4. The injunctive procedure of the statute operates to deny to the public the right to read it, even before it is ever circulated.

5. In cases of alleged "obscenity" the constitutional protection against prior restraints applies as it does to any other case of infringement of expression.

6. "Obscenity" is no worse than libel. Yet libel is protected from prior restraint.

7. Before a publication can be denied constitutional protection it must at least be shown that the words will probably and imminently produce anti-social behavior. No such evidence is available.

What Is at Stake in This Case

The words of Judge Pound in *People* v. *Gitlow*, 234 N. Y. 132, 158, that "the rights of the best of men are secure only as the rights of the vilest and most abhorent are protected" applies here to publications that may be deemed of no social value. Indeed, in the recent case of *Winters* v. *New York*, 333 U. S. 507, it was held that even publications of no social value are entitled to protection.

In its broader aspects, this appeal presents a question of first magnitude in the field of the dissemination of ideas. What will be decided and said by the Court here will affect the problem of censorship with relation to claims of obscenity not only with relation to prior restraints through court injunctions, but also through administrative officials, such as motion picture licensors.

If the principle of prior restraint by injunction is sustained here, then it could be extended and applied equally to newspapers, motion pictures, plays, paintings, phonograph records and even public addresses. In other words, the principle could be expanded to the point where a court of equity would become a licensor, censor and official book burner. (The former function is exercised by temporary injunction against issuance of the book and latter func-

tion is fulfilled by a direction to the sheriff to seize and destroy.) A more ignoble role for a court cannot be found in the history of our jurisprudence. See *Brandreth v. Lance*, 8 Paige 24.

> "Not only is the general law of obscenity absurd as applied to literature, and not only is the task of judging literature beyond the average judge's capacity and ability, but as a matter of physical organization courts are not able to do justice to literature, in the main, even had they such capacity and ability". Alpert, "Judicial Censorship of Obscene Literature," 52 Harv. Law. Rev. 40, 71.

To say, as Special Term does (R. 58) that the instant publications are of no social value and serve no useful purpose is to fall into the error of censorship. It puts the cart before the horse, through circuity of reasoning. It assumes the role of the censor and at the same time disavows the censor's role. The censor assumes the role of the censor and pronounces judgment on the worth of a book, steadfastly announcing that he is not censoring, although in passing judgment, he is actually censoring. This has been the practical fault of all censorship, and history has shown how wrong the censors are. See, Haight, "Banned Books: Informal Notes on Some Books Banned for Various Reasons at Various Times and in Various Places" (2 ed. 1955) cited by Special Term (R. 55), where among other things, is found Plato's suggestion that Homer be expurgated for immature readers.

To say, as Special Term does, that the books in this case will not be listed in "Banned Books" is to beg the whole question. The difficulty, with the role of censorship

is this lack of competence to foresee the future. Undoubtedly, the censors of the books on that list thought they were competent to adjudge and condemn the publications. Yet, as Special Term observes (R. 56) those books became classics.

While appellants do not contend that the books in this case will be classics, the test (whoever can set up such a test) however is not whether books will become classics. The test is, is there a prior restraint by someone who prevents the publication from circulating.

By this statute, the office of censor is conferred on the judiciary. To substitute a judge for an administrative officer to perform the job of censorship does not endow the statute with constitutional validity. This was well-settled in *Cantwell* v. *Connecticut*, 310 U. S. 296, where it was held that it did not make any difference whether the prior restraint was by an administrative officer or by a Court. The fact that a court can sit in judgment on the conduct of an administrative officer does not save the statute, containing a prior restraint. Said the Court, "Moreover the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint, which in the field of free speech and press, we have held inadmissible."

Special Term sought to distinguish that case (R. 64), by stating that the instant case did not involve the requirement of a license. But that is not the principle involved. The principle cuts much deeper. The principle is that a prior restraint is inadmissible to anyone, because history has shown that censors are not to be trusted with the determination as to which publications may be dis-

seminated. Indeed, in the *Cantwell* case the Court followed the words just quoted with the following additional observation: "A statute authorizing previous restraint upon the exercise of the guaranteed freedom by *judicial decision after trial* is as obnoxious to the Constitution as one providing for like restraint by administrative action." (Emphasis supplied.)

Another well-settled principle is that a restraint upon distribution is as offensive as a restraint on publication. One cannot operate without the other. Publications are generally created for dissemination. To bar dissemination is to effectually restrain publication. In *Lovell v. Griffin*, 303 U. S. 444 it was held: "The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom of liberty as liberty of publishing; indeed without circulation, the publication would be of little value.' Ex Parte Jackson, 96 U. S. 727, 733."

What the Court of Appeals Decided

Two of the Judges concurred in an opinion by Judge Desmond in holding that previous decisions by this Court foreclosed any doubt about the validity of the statute.

Two other Judges concurred in an opinion by Judge Fuld which stated that no prior restraint is involved here, because decision to restrain is arrived at by a court after a hearing. It distinguished such situation from that of an administrative censor of a motion picture before it is distributed.

In arriving at this conclusion, the opinion overlooked the decision and words of the *Near* case, and also over-

looked the fact that the dissenting Justices in *Near* said the same thing, but did not prevail.

In principle there is no difference between an administrative official who prevents distribution of, let us say, a motion picture and a judge who issues a temporary and then a permanent injunction against a publisher or distributor who is about to broadcast the book. In both cases, the subject is prevented from circulating.

The present case is identical with *Near* from the issuance of a temporary injunction to final injunction. The only difference is that *Near* dealt with a libel and this deals with the subject of obscenity.

It should also be observed at this point that the opinion (R. 87) unfortunately falls into a mistake of stating that *Near* was directed only against *future* publication of issues containing defamatory matter. The fact is that the judgment was directed also against *present* issues. Both were held inadmissible by this Court (p. 704, bottom, 706).

Another regrettable emphasis in the Court of Appeals (R. 88) is that the *Near* case dealt with political figures and public officials. It will be found, however, that the defamatory articles were directed also against private persons, newspapers and the "Jewish race". Since *Near*, this Court made clear in *Winters* v. *New York*, 333 U. S. 507, that it is not informative publications alone that are entitled to constitutional protection.

We now proceed to examine and apply the applicable constitutional principles:

POINT I

Prior restraints on publications and distribution are prohibited by the Federal Constitution.

In discussing this Point the subject is treated without any special reference to the element of "obscenity". Particular application of the rule to "obscenity" will be treated subsequently in Point III.

Justice Holmes pointed out that the First Amendment was adopted for the very purpose of preventing previous restraints in the light of the abuses of the past such as seditious utterances and licentiousness. *Leach* v. *Carlisle*, 258 U. S. 138, 141. See also, *Patterson* v. *Colorado*, 205 U. S. 454, 462; *Lovell* v. *Griffin*, 303 U. S. 444, 451, 452; *Superior Films* v. *Department of Education*, 346 U. S. 587, per Justice Douglas, concurring; *United States* v. *Paramount Pictures*, 334 U. S. 131, 166; Judge Frank in *Roth* v. *United States*, No. 582, argued jointly with this case.

Previous restraints means restraints on the dissemination of ideas. It means suppression of a publication or an idea. These may be accomplished by seizing and destroying publications or by enjoining their circulation to the public. In both cases, dissemination is throttled. (Both methods are involved here.) A person may be willing to risk punishment for his book, but at the same time he may keep his book alive. The history of the past and present shows that there are individuals of that mind.

It should be noted that New York has a penal statute which covers the violations provided by the law under attack. See, Section 1141, Penal Law of New York.

Blackstone said (4 Blackstone 151-152), "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no prior restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.".

In other words, Blackstone states that there cannot be a restraint in advance, but that punishment or liability may be incurred.

The criticism of Blackstone has been made, not that this statement is unsound, but rather that it does not go far enough to protect innocent publications from subsequent punishment or liability. (See, 2 Cooley, Constitutional Limitations, (8 ed.) p. 885.)

Near v. *Minnesota*

The present case is governed by *Near* v. *Minnesota*, 283 U. S. 697. Since this case is the key to the solution of the present case and has been the leading case on prior restraints, it is essential that it be given full exposition. In the *Near* case an injunction statute was patterned along lines similar to the statute under attack here. There an injunction action was brought under the Minnesota law which permitted a county attorney to bring an action for an injunction against any person for publishing: (a) an obscene magazine or periodical, or (b) a scandalous and defamatory newspaper. Participation in such business was deemed the commission of a nuisance. The action

was brought on November 22, 1929, and an order to show cause was made directing the defendants to show cause why a temporary injunction should not issue and meanwhile forbidding the defendants "to publish, circulate or have in their possession any editions of the periodical *from September 24, 1927 to November 19, 1927*, inclusive, and from publishing, circulating, or having in their possession, any future editions of said The Saturday Press and any publication, known by any other name whatsoever containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff's complaint herein or otherwise" (as p. 704, bottom, emphasis supplied).

The reason the emphasis was supplied in the previous paragraph is that attention should be directed to the fact that the action to enjoin circulation as well as publishing was directed against editions that were published prior to the commencement of the action in November, 1927. This emphasis is not unwarranted, because it has been observed that this aspect of the *Near* case has either been ignored or overlooked.

The editions of the publication in question were devoted to libelling public officers, newspapers, many private persons and the "Jewish race".

The trial court found that the newspaper did regularly publish and circulate a defamatory newspaper and thereby constituted a public nuisance. Judgment was thereupon entered adjudging the newspaper a public nuisance to be abated. The judgment enjoined the defendants from producing or circulating or having in their possession any publication *whatsoever* which is a defamatory newspaper and from further conducting said nuisance under the name "The Saturday Press" or any other name (p. 706).

This Court held: the statute is to be tested by its operation and effect (p. 708). It followed, therefore, that the statute was aimed at the distribution and publication of scandalous and defamatory matter as being detrimental to public morals and general welfare. *The object of the statute was not punishment, but suppression.* The reason for its enactment is that prosecutions to enforce in penal laws for libel were not considered effective suppression of the evils of scandal and defamation. (A similar history exists here.)

The defendant had conceded that the newspapers were defamatory. He contended, however, that he can publish them and be punished later. The court held that even though the publication in question might subject the publishers and distributors to subsequent punishment under libel or other laws, nevertheless, they were protected against prior restraint (715, 718).

The Dissent

The dissent was substantially as follows:

1. This is not a case of a prior restraint, because no administrative official is censoring a publication in advance of its publication. It is a court that is rendering judgment on the publication by way of injunctive relief.

> "It is fanciful to suggest similarity between the granting or enforcement of the decree authorized by this statute to prevent *further* publication of malicious, scandalous and defamatory articles and the *previous restraint* upon the press by licensers as referred to by Blackstone and described in the history of the times to which he alludes" (p. 736).

2. The libels alleged were of social evil on a par with that of obscenity (p. 737).

Some earlier cases that bear on the subject are:

In the early and leading New York case of *Brandreth v. Lance*, 8 Paige 24 (1839) the complainant had manufactured pills that were well-known. A former employee threatened to publish a false and libelous life story about the manufacturer. The manufacturer brought suit to enjoin the publication on the ground that he needed protection of his personality (as distinct from his business interest). The publication was to be a threatened invasion of his privacy by defamation. The injunction action was nevertheless dismissed on two grounds: first, that equity would not protect rights in personality by an injunction, and secondly, that such exercise of judicial power would interfere with constitutional protection against previous restraints of speech.

The Chancellor in that case said, "It is very evident that this court cannot assume jurisdiction of the case presented by the complainant's bill, or of any other case of a like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which, as the Legislature has decided, cannot safely be entrusted to any tribunal consistently with the principles of a free government.

"This bill presents the simple case of an application to the court of chancery to restrain the publication of a pamphlet which purports to be a literary work, undoubtedly a tale of fiction, on the ground that it is intended as a libel upon the complainant. The Court of Star Chamber in England once exercised the power of cutting off

the ears, branding the foreheads, and slitting the noses of the libelers of important personages. Hudson's Star Chamber, 2 Collect. Jurid. 224, and, as an incident to such jurisdiction, that court was undoubtedly in the habit of restraining the publications of such libels by injunction. Since that court was abolished, however, I believe there is but one case upon record in which any court, either in this country or in England, has attempted, by an injunction or order of the court, to prohibit or restrain the publication of a libel, as such, in anticipation. In the case to which I allude the notorious Scroggs, Chief Justice of the Court of King's Bench, and his associates, decided that they might be safely entrusted with the power of prohibiting and suppressing such publications as they might deem to be libelous.

"They accordingly made an order of the court prohibiting any person from printing or publishing a periodical entitled 'The Weekly Packet of Advice from Rome, or the History of Popery.' The House of Commons, however, considered this extraordinary exercise of power on the part of Scroggs as a proper subject of impeachment 8 Harv. St. Tr. 198. And I believe no judge or chancellor from that time to the present has attempted to follow that precedent."

Ex Parte Tucker, 110 Texas 335, 220 S. W. 75 (1920) held unconstitutional an injunction against slander. "It has never been the theory of free institutions that the citizen could say only what courts or legislatures might license him to say, or that his sentiments on any subject or concerning any person should be supervised before he could utter them. Nothing could be more odious, more

violative or destructive of freedom, than a system of only licensed speech or licensed printing * * * Hallam characterized the liberty of the press as finally gained in England, as but exemption from a licenser * * * "

"But there is no power in courts to make one person speak only well of another. The Constitution leaves him free to speak well or ill; and if he wrongs another by abusing this privilege, he is responsible in damages or punishable by criminal law."

In *Howell* v. *Bee Pub. Co.*, 158 N. W. 358 court held it could not enjoin the publication even of a falsehood, without infringing upon the protection of the freedom of the press.

Some Leading Cases Subsequent to *Near* v. *Minnesota*

Since the *Near* case was decided, other cases illustrate the principle that a previous restraint means any technique provided for use by a public official whereby the official may prevent publication or distribution. The statute works a restraint because a judicial officer is enabled to interfere by injunction with the dissemination of writings he deems to violate the terms of the statute. The statute thereby infringes on all that was decided by recent decisions of the Supreme Court of the United States. These cases bear out this contention:

In *Lovell* v. *Griffin*, 303 U. S. 444 (1937) the defendant was convicted of violating an ordinance in that she did not apply for or obtain a permit before she distributed a pamphlet and magazine, which consisted of religious matter. The ordinance required that a written permit be ob-

tained from the City Manager by all persons who distributed literature of any kind, whether delivered free or whether sold.

The Supreme Court held this requirement unconstitutional as an interference with the press. The constitutional guarantee, it was held, covers distribution as well as publication. The Court said:

> "The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager.
>
> We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish 'without a license what formerly could be published only with one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. See Patterson

> v. Colorado, 205 U. S. 454, 462; Near v. Minnesota, 283 U. S. 697, 713-716; Grosjean v. American Press Co., 297 U. S. 233, 245, 246. Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form.
>
> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated. Near v. Minnesota, supra; Grosjean v. American Press Co., supra; De Jonge v. Oregon, supra.
>
> The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' Ex parte Jackson, 96 U. S. 727, 733. The license tax in Grosjean v. American Press Co., supra, was held invalid because of its direct tendency to restrict circulation."

In *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) a statute provided that no person shall solicit money, services, subscriptions or any other valuable thing for any alleged religious, charitable or philanthropic cause unless the cause was approved by the secretary of the public welfare council. It was provided that the secretary shall determine whether the cause is a religious one or a bona fide object of charity. If he approved he issued a certificate.

The defendants were convicted for violating the statute. Then defendants went from house to house. They asked the householder who answered if they could play a phonograph record. If consent was given the defendants played, and offered to sell a book on a religious subject. If the person refused to buy, the defendants would ask for a contribution and when receiving same would give away a religious pamphlet.

The State Supreme Court had construed the activities of defendants to be that of soliciting contributions for a religious cause.

The statute in question as construed and applied was held unconstitutional, in that it deprived the defendants of their right to religious liberty. There is a prior restraint on the exercise of religion in requiring a certificate as a condition precedent to soliciting. The vice furthermore was that the regulation was not of time and place of solicitation. It placed in the hands of the secretary the power to determine what was a religious cause that he would approve. His refusal was based on his appraisal of the facts, the exercise of his judgment and the formation of an opinion. It was not enough that an aggrieved party could appeal to the courts. The Court said:

> "It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the States; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts,

the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

The State asserts that if the licensing officer acts arbitrarily, capriciously, or corruptly, his action is subject to judicial correction. Counsel refer to the rule prevailing in Connecticut that the decision of a commission or an administrative official will be reviewed upon a claim that 'it works material damage to individual or corporate rights, or invades or threatens such rights, or is so unreasonable as to justify judicial intervention, or is not consonant with justice, or that a legal duty has not been performed.' It is suggested that the statute is to be read as requiring the officer to issue a certificate unless the cause in question is clearly not a religious one; and that if he violates his duty his action will be corrected by a court.

To this suggestion there are several sufficient answers. The line between a discretionary and a ministerial act is not always easy to mark and the statute has not been construed by the state court to impose a mere ministerial duty on the secretary of the welfare council. Upon his decision as to the nature of the cause, the right to solicit depends. Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. *A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after*

trial is as obnoxious to the Constitution as one providing for like restraint by administrative action." (Emphasis supplied.)

In *Schneider* v. *State*, 308 U. S. 147, the statute of the Town of Irvington forbade the distribution of literature without a license which could be refused by the Chief of Police upon his finding that the canvasser is not of good character or the project is not free from fraud. The applicant was required to be photographed and fingerprinted. The Supreme Court struck down the statute on the ground that the requirement of a permit was a prior restraint upon free speech. It permitted the police officer to determine what literature may be distributed and who may distribute. This is censorship.

In *Kovacs* v. *Cooper*, 336 U. S. 77, 82, it was said: "When ordinances undertake censorship of speech or religious practices before permitting their exercise, the Constitution forbids their enforcement."

See also *Saia* v. *New York*, 334 U. S. 558, holding void an ordinance which required a permit as a condition to using a loud-speaker in public.

Also, *Kunz* v. *New York*, 340 U. S. 290, which voided the New York City ordinance requiring a license for a preacher of religion. It was voided among other things, on the ground that no standards existed to guide the discretion of the licensor and thus placed the power of censorship in his hands.

In *Largent* v. *Texas*, 318 U. S. 418, the ordinance required that a license be obtained to sell books, wares or merchandise. The issuance of the permit was left to the

mayor. He could issue it upon his investigation, and if he deemed it proper or advisable.

The defendant was charged and convicted of violating the ordinance in that he offered books for sale without obtaining a license. The defendant was a member of Jehovah's Witnesses and sold the various boks for a "contribution" of 25¢. If the "contribution" was not made, the book was given without charge. The Court held it was unnecessary to decide whether the distributions were sales or contributions. It was enough that the mayor was empowered to issue the permit only if after investigation he deemed it proper or advisable. This made distribution dependent upon the official and is thus censorship forbidden by the Federal Constitution.

In *Thornhill* v. *Alabama*, 310 U. S. 88 it was said (p. 97): "* * * Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. *Schneider* v. *State*, 308 U. S. 147, 162-165; *Hague* v. *C. I. O.*, 307 U. S. 496, 516; *Lovell* v. *Griffin*, 303 U. S. 444, 451. The cases when interpreted in the light of their facts indicate that the rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. Rather it derives from an appreciation of the character of the evil inherent in a licensing system. The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public

concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near* v. *Minnesota*, 283 U. S. 697, 713."

Murdock v. *Pennsylvania*, 319 U. S. 105 at 116 emphasized clearly that the right to distribute literature cannot be restrained *even if the literature is abusive, provocative or distasteful.*

See also, *Hague* v. *C. I. O.*, 307 U. S. 496; *Thomas* v. *Collins*, 323 U. S. 516; *Joseph Burstyn Inc.* v. *Wilson*, 343 U. S. 495; *Superior Films* v. *Department of Education*, 346 U. S. 587; *Gelling* v. *Texas*, 343 U. S. 960; *Holmby Productions* v. *Vaughn*, 350 U. S. 870.

See also comprehensive opinion of Justice Frankfurter in *Niemotko* v. *Maryland*, 340 U. S. 268, 276.

Distribution Is as Protected as Publication

In *Lovell* v. *Griffin*, 303 U. S. 444, this Court made clear that circulation was protected equally with publishing. "Indeed without circulation, the publication would be of little value", citing from *Ex Parte Jackson*, 96 U. S. 727, 733.

Gompers Case Is Distinguishable

The *Gompers* case that is cited in the *Near* case (*Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418) was grounded on force—not free speech, and therefore, an injunction could issue.

In *Gompers*, the petitioner was held in contempt in that he violated the terms of injunction order which enjoined him from continuing a boycott or from publishing any statement that there was a boycott against a certain firm.

The American Federation of Labor (A. F. L.) of which the petitioner was president had a controversy with respondent over hours of labor. It led to a boycott being declared by A. F. L. Whereupon respondent was declared "Unfair" and was so published in the publication of A. F. L. called "American Federationist" which has a wide circulation among the public and in the A. F. L.

Thereafter the respondent brought action for an injunction against petitioner alleging that petitioner and others had entered into a conspiracy to restrain respondent's business by the boycott and the publication of the "unfair list."

Temporary and permanent injunctions were granted restraining the petitioner and others from the boycott and the publishing of respondent's name on the "unfair" list or "We don't patronize" list published by petitioners.

Defendants appealed from that judgment. But before a decision was had contempt proceedings were instituted for a violation of the judgment. The entire record and proceedings of the original suit were made a part of those proceedings.

The contempt proceeding charged that the petitioner continued the boycott and the publications. The petitioner and others were adjudged in contempt and imprisoned.

Among the contentions made by petitioner in resisting the contempt was that if the publication be deemed to have violated the injunction then the judgment was a violation of freedom of the press.

The Supreme Court held that this attack raises no question as to abridgement of freedom of speech but only involves power of equity to enjoin defendants from continuing a boycott which by words, signals, printed or spoken caused or threatened irreparable damage

There was a conspiracy here.

"The court's protective and restraining powers extend to every device whereby property is irreparably damaged or commerce is illegally restrained."

"In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words 'Unfair,' 'We don't patronize', or similar expressions, a force not inherent in the words themselves, *and therefore exceeding any possible right of speech which a simple individual might have.* Under such circumstances they become what have been called 'verbal acts', and as such subject to injunction as the use of any other force whereby property is unlawfully damaged. When the facts in such cases warrant it, a court having jurisdiction of the parties and subject matter has power to grant an injunction." (Emphasis supplied.)

The situation here should not be confused with cases involving strikes and labor disputes (see opinion f. 195).

Labor disputes do not merely touch upon free speech and press. They go further—they involve property rights (as distinct from personality) and concerted duress. This is illustrated by *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722, where an injunction was granted against picketing. See also *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490; *Bakery & Pastry Drivers* v. *Wohl*, 315 U. S. 769; *Cafeteria Employee's Union* v. *Angelos*, 320 U. S. 293. They all illustrate the distinction,—that picketing is more than just speech.

See also in this connection: *Thornhill* v. *Alabama*, 310 U. S. 102; *A. F. L.* v. *Swing*, 312 U. S. 321; *Milk Wagon Driver's Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287.

POINT II

The injunctive relief and the seizure and destruction of the publications operate as a prior restraint.

It was said in the *Near* case that the statute must be judged by its "operation and effect" (p. 708).

The operation and effect of the statute here serves to create a prior restraint on publications. The statute empowers a public official to:

(a) Obtain a stay in an order to show cause to prevent a publisher or distributor from publishing or circulating a book until the hearing on a temporary injunction. (Section 882 Civil Practice Act, New York reads: "Where an application for an injunction is made upon notice, either before or after answer, the court or judge may enjoin the

defendant until the hearing and decision of the application.")

(b) A temporary injunction may issue pending the action. (Section 877, Civil Practice Act of New York provides: "Where it appears from the complaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act, the commission or continuance of which during the pendency of the action would produce injury to the plaintiff, an injunction order may be granted to restrain it.")

(c) The judgment of the court may restrain the person who possesses with intent to distribute or is about to acquire with the intent to distribute any publication which is obscene. The injunction is to prevent the distribution or acquisition for the purpose of distribution of such publications (Sect. 22-a, sub. 1 Code of Criminal Procedure).

(d) Such judgment of injunction *shall* contain a provision directing such enjoined person to surrender such publications to the sheriff of the county in which the action is brought for the purpose of destroying them (Sect. 22-a, sub. 3, Code of Criminal Procedure).

The Effect of the Statute

The effect of the operation of the statute is one of suppression before the publication can reach distribution to the public. The effect is produced as follows: Suppose a person wishes to acquire a book for the purpose of distribution or already has acquired it for that purpose. Suppose further, that the book had never before reached the

public or even a book reviewer. The corporation counsel, under this law can commence an action for an injunction, get a stay upon an application for a temporary injunction and then upon a final judgment by an equity judge, have the books seized and destroyed.

All these procedures took place in this case (R. 39, 13, 14).

The Public Is Thus Deprived of Reading

The effect of it would be that this book would never circulate and the public would be deprived of its right to read the book and assess its value. (Cf. *Butler* v. *Michigan*, No. 16 October Term 1956, decided February 25, 1957, where it was said, "It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society.")

The supposed book might have been Southey's "Wat Tyler" or Byron's "Cain" or Byron's "Don Juan" or Shelley's "Queen Mab", which were condemned respectively in *Southey* v. *Sherwood*, 2 Mer. 435; *Murray* v. *Benbow*, Jac. 474 n; *Lord Byron* v. *Dugdale*, 1. L. J. Ch. 239, Moxon's Case, 2 Townsend's Mod. St. Tr. 356. These were the incidents that brought forth these words from Judge Augustus N. Hand in *United States* v. *One Book Entitled Ulysses*, 72 F. (2d) 705:

"The foolish judgments of Lord Eldon about one hundred years ago, proscribing the work of Byron and

Southey, and the findings by the jury under a charge by Lord Denman that the publication of Shelley's 'Queen Mab' was an indictable offense are a warning to all who have to determine the limits of the field within which authors may exercise themselves."

This language was subsequently approved in *Parmelee* v. *United States*, 113 F. (2d) 729, 737, 738; *Hannegan* v. *Esquire*, 327 U. S. 146, 157, 158.

Were the book of this calibre, then its suppression and destruction would have prevented it from proving its value in the market place where all books contend with difficulty for recognition.

Thus, the statute under attack is fraught with a great danger. The peril is at least equal to that of preventing distribution of a book without a license.

The effect runs both against the publisher who has a publication ready for sale for the first time and against the distributor who has the book ready to be circulated for the first time.

In this respect, the restraint is worse than in *Near* because there the statute was directed against a person who makes it a business of regularly defaming people. The implication there is that the publication had to be revealed to the public in order that it could be found to be defamatory as a regular business.

Restraints Against Distribution of Existing Publications Are as Inadmissible as Those Against Further Publication

In the *Near* case the restraint was against existing issues of the newspaper that had been adjudicated defamatory as well as against future publications that may prove defamatory. Despite this Court's decision that injunction would not lie against either, nevertheless, it has been observed that a misunderstanding has arisen that this Court held that only future publication was protected.

Although this is a mistaken reading of the decision it should be noticed that there is no difference in the case of a book, as distinct from a newspaper, between restraint of distributing books in being from restraint in distributing future issues of the same book. A book has more than a one-day value. If one possesses a book for distribution, he expects to distribute that book and not future issues of it. The book in being has value to the person who wishes to circulate it.

Difference Between Prior Restraint and Subsequent Punishment

The *Near* case, which has been consistently adhered to by this Court since its decision is a complete answer that a distinction exists between prior restraint and subsequent punishment. The difference is both historical and psychological.

A commentator on the doctrine of prior restraint of offensive publications saw no difference between injunctions in advance and punishment later. In both cases, he

believed, the effect is to deter or discourage offensive publications. (Pound, Equitable Relief against Defamation and Injuries to Personality, 29 Harvard Law Rev. 640.)

The *Near* case effectively rejected Pound's position and distinctly represents an affirmation of the historical and psychological distinction between prior restraint and punishment subsequent to publication or distribution.

But the difficulty with Pound's observation is that it is too mechanical. It fails to account for the numerous persons and even martyrs through history who were willing to take the consequences of their writings so long as their publications circulated. Those stalwarts were not deterred by threatened punishment.

It also fails to allow for the constitutional right of the public to read. The statute here, by injunction and destruction can prevent a publication from reaching the public. Whereas, in the case of the person who is willing to risk punishment for his writings, the public is able to read and evaluate even though the publisher goes to jail.

In this connection, it should be noticed that *Near* admitted that although he stood ready to be punished for what he did, no law could restrain him from publishing (at p. 730).

Subsequent punishment protects a person more readily, because in criminal prosecutions the guilt of the alleged offender must be proved beyond a reasonable doubt; whereas in equity, it is the satisfaction of the chancellor's notions of obscenity that decides whether an injunction should be granted. In a criminal prosecution, a jury may be had (N. Y. City Criminal Courts Act, Sect. 31, Sub. 1

[b] [c]; *People* v. *Price*, 53 N. Y. S. (2) 47). In an equity case such as this, the use of a jury is discretionary with the judge, who is at liberty to accept or reject the findings (Section 430, Civil Practice Act; *Learned* v. *Tillotson*, 97 N. Y. 1).

Restraint by a Judge Is as Inadmissible as Restraint by an Administrative Officer

The opinion of Judge Fuld seems to have rested on the premise that restraint by a judge after trial is not the same as restraint by an administrative officer. But *Near* stands for exactly the contrary position. In taking that position, the majority of this Court overruled the minority whose dissent was also that a judge's restraint is not that of an administrative officer.

Subsequently, in the *Cantwell* case, this Court reaffirmed that view with the observation:

> "Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. *A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.*" (Emphasis supplied.)

This can be only right, for we have seen the effect of the operation of the injunctive procedure from its inception, which culminates in the seizure and destruction of a book that has not yet been presented to the public.

It is not intended to be disrespectful by asking in what manner can a judge claim more competence in this field of obscenity than any other be he administrative official or private citizen? There are no experts as to what is obscene or not. With the marked eagerness with which courts shift questions of fact to administrative officials on avowals of expertness, it might even be said that such officials have been regarded more reliable by the judiciary as experts in certain fields.

Moreover, the administrative official today, may be a judge tomorrow.

In *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, at p. 251, Justice Holmes said:

> "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value,—it would be bold to say that they have not an aesthetic and educational value,—and the taste of any public is not to be treated with contempt."

had to choose between the social evil that was protected in *Near* and the publications in this case, the lesser evil would be the publications involved here. Nevertheless, the *Near* disseminations were protected from prior restraint.

No Exceptions Against Prior Restraint Appear

The prior restraint doctrine, Cooley (2 Cooley, Constitutional Limitation, 8 Ed. p. 885) points out exists for the purpose of avoiding the licensor or censor. The field of obscenity, like the field of sedition in another day has the zealous attention of the censor today. Prior restraint must be avoided in cases of obscenity as in cases of sedition, and whether by administrative officer or by court.

Would this Court at this date countenance a law whereby a publisher would be required to submit a book to censor for his examination and approval against obscenity? If not, then there is no rational justification for countenancing prior restraint by a judge who decides if the book is free from obscenity. Since the similarity in prior restraint exists as to both public officials, the logical conclusion follows that both restraints are bad.

Although the Court in *Near* attempted through dicta to catalog exceptions to the rule, it is submitted that such list was not fully analyzed. Certainly, nothing was said to support the dicta that obscenity does not enjoy protection. No authority was suggested, nor was the statement pursued with any comprehensive treatment.

There is no basis for the making of obscenity an exception. Other evils were sought to be eradicated by prior restraint yet this Court did not allow them. Some of the

evils are libels (*Near*) littering of the streets with pamphlets (*Schneider* v. *State*); expected disorderly conduct (*Hague* v. *C.I.O.*); religious incitements (*Kunz*). There can be no rational basis for excepting obscenity. If such basis exists, none has been presented. *A fortiori*, books asserted to be obscene are entitled to greater protection. There is too much doubt and *ad hoc* legislation attending the application of the amorphous definitions of obscenity. (See, for example, Lockhart and McClure (*op. cit.*), Minnesota Law Rev. March, 1954 p. 320 where the authors state in their exhaustive study, "No one seems to know what obscenity is. Many writers have discussed the obscene, but few can agree upon even its essential nature." See also at page 352, "An Open Question"; and Judge Frank in *Roth* v. *United States*, No. 582, to be argued jointly with this case.) Since these shifting appraisals of obscenity are placed in the hands of an equity judge, the danger from prior restraint is as great as on the day the First Amendment was adopted to protect against such evils.

The Doctrine Is Necessary in Cases of Claimed Obscenity

Since the injunctive procedure, as above outlined has the effect of enabling a judge to assess the book and condemn it to the flames before it sees the light of the public's eye, it follows that the doctrine against prior restraints must be applied.

To permit this statute to survive, not only is the public denied its constitutional right to read and evaluate, but it also prevents the book from establishing its effect on the community.

A Publication Must Be Shown to Probably and Imminently Create an Evil Before Punishment

In *Dennis* v. *United States*, 341 U. S. 494, it was decided that in order to punish for words, it must be shown with sufficient probability that the words would lead to some overt anti-social conduct.

Such proof has not been tendered in this case. The state of learning in this respect is at best obscure and doubtful. Experts who have approached the subject have reached conclusions as wide apart as the poles.

See in this respect the research study made by Jahoda and staff, The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate, cited in by Court of Appeals (R. 81, note 3), and as further clarified and elaborated by Judge Frank in *Roth* v. *United States, supra.* The conclusions made are that the effect of obscene literature on adults has not been scientifically demonstrated. Research indicates that there is no evidence to justify the assumption that reading such literature leads to anti-social actions. See also, Lockhart and McClure, 20 Law and Contemporary Problems, 587, 595; Alpert, Judicial Censorship of the Press, 52 Harvard Law Review, 40, 72; Judge Bok in *Commonwealth* v. *Gordon*, 66 Pa. D & C 101; *State* v. *Lerner*, 51 Oh. L. Abs. 321, 337; *Parmelee* v. *United States*, 113 Fed. (2d) 729).

Since the element of causality is lacking between the words of the book and probable anti-social action flowing therefrom, it follows that this publication is protected at least from prior restraint.

If this book were freed from prior restraint and permitted to circulate, it would enable a court or a community to determine its effect on conduct. In which case a different problem would arise than here presented.

This Action Is Not One for the Abatement of a Nuisance

Nor can this statute be deemed supported by common law jurisdiction of injunction for abatement of nuisances (see opinion f. 194). *Lawton* v. *Steele*, 152 U. S. 133. Books have never been deemed to be within the category of a nuisance. On the contrary, they have a preferred status of protection under the Constitution. *Thomas* v. *Collins, supra; Beauharnais* v. *Illinois, supra.* As early as the *Bandreth* case and as recent as *Near* it was made clear that injunction against publications is not within the category of common law actions. The history of the doctrine against restraints of speech amply explains that in a democracy speech must be kept free from official supervision.

CONCLUSION

In this case the Court faces an issue of crucial importance to the doctrine of prior restraint. The decision must either reaffirm the doctrine against prior restraints or else weaken it. Nothing can be argued in favor of placing obscenity in a special category that would not fit any other character of publication. In the cited pertinent cases, it was a social evil claimed to be derived from speech that was sought to be abated.

The cry now for prior restraint of another form of evil through publication should not receive any better reception than the others fared. A decision against the appellants, placing "obscenity" in a special category would make fair game for a destruction of the doctrine, because no special reason can be found to isolate obscenity.

Respectfully submitted,

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In *United States* v. *Alpers*, 338 U. S. 680, at p. 686, it was said by Justice Black, dissenting, with the concurrence of Justices Frankfurter and Jackson:

> "People of varied temperaments and beliefs have always differed among themselves concerning what is 'indecent.' Sculpture, paintings and literature, ranked among the classics by some, deeply offend the religious and moral sensibilities of other. And those which offend, however priceless or irreplaceable, have often been destroyed by honest zealots convinced that such destruction was necessary to preserve morality as they saw it."

POINT III

All publications whether "obscene" or not are entitled to protection from prior restraint.

Up to this point it has been the contention of appellants that the statute works a prior restraint, and that an injunction order and a direction for seizure and destruction of the publication is nevertheless a prior restraint.

It is appellants' further contention that such restraint offends the Constitution even when a judge finds the publication "obscene" (assuming workable definition can be given to the word).

There are no cases in this Court that have decided that the doctrine against prior restraint does not apply to cases of claimed obscenity. No case has been decided on the basis of a finding of such fact. Nor is there any historical showing of prior restraints against publications of such a character, unless one were to lump it with the early evils

of restraints by licensors against seditious utterances, against which it was shown in Point I, the First Amendment was adopted.

Dicta as to Obscenity

While in the *Near* case by way of dictum, language is found that obscene publications are not protected, nevertheless, the dictum has never been applied or clarified. See, Lockhart and McClure, The Law of Obscenity, and the Constitution, Minnesota Law Review, March, 1954; p. 352, under "An Open Question"; also, 22 University Chicago Law Review, 222, Note 46; The Doctrine of Prior Restraint, by Thomas I. Emerson, 20 Law and Contemporary Problems, 648 at 661.

The dictum in *Near* contains two obscurities. First, the statement that obscene publications are not constitutionally protected could have meant that the publisher or distributor of the publications might be punished, as was the situation in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, and *Winters* v. *New York*, 333 U. S. 507. This would leave untouched the doctrine against prior restraints. The *Near* dictum, which was followed in *Chaplinsky* and *Winters*, simply holds, therefore, that the publisher and distributor of such publications may be punished (cf. *Doubleday & Co., Inc. v. New York*, 335 U. S. 848, and *Beauharnais* v. *Illinois*, 343 U. S. 250).

A second obscurity of the dictum is found in the subsequent joinder of the obscene with the *libelous* as in *Chaplinsky* and *Beauharnais* as not being constitutionally protected. Although in the *Near* case the libel was most offen-

sive, this Court, nevertheless decided that such publications could not be restrained from being distributed or from being published in the future. Yet in *Chaplinsky* and *Beauharnais* it permitted punishment.

The *Chaplinsky* and *Beauharnais* cases reveal, however, that although libel cannot be enjoined because of *Near*, nevertheless, they may be punished. This marked difference would apply in all cases, so that one can say that prior restraint is forbidden even if punishment is available.

Those cases also indicate the problem of the Court in wrestling with "libel", to equate it as an evil comparable to obscenity. Yet *Near* prevented the restraint of libel. If they are equated then it follows that obscenity is entitled to the same freedom from prior restraint as libel.

The dicta in those cases, therefore do not clarify whether they apply to prior restraint or subsequent punishment.

In any event, dicta even if clear is not decisive of a case. Since the fact of obscenity was not before the Court in those cases, the concept was not carefully analyzed or stated.

The Evil in *Near* Was Greater Than in This Case

If one is drawn into comparing the social evils to be restrained it could be argued with great force that the libels of a race, and incitements against persons of that race in *Near* presented a much greater social evil than the publications in this case. Yet this Court refused to permit such inflammatory publications to be restrained.

There are many persons who would regard the publication in the *Near* case a much greater evil to society than the publications here. In *Near*, the publication screamed against and aroused hatred against a whole race and people. The publications before this Court, at the worst, can be regarded as "sexy." Given a choice between evils, many persons would regard the latter less offensive than the former. The fulminations of the *Near* publication were the fulminations of Hitler, that slaughtered six million people. The causal effectiveness in social damage by obscene publications has yet to be demonstrated beyond debate.

There is a close alliance between defamatory statements and obscenity. Not only is their commonness one of offensive utterances, but both have been the subject of dicta, that they are not constitutionally protected (see *Winters* v. *New York*, 333 U. S. 507; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568). Therefore, the *Near* case and its antecedents is important to a decision in this case.

The dissenting justices in *Near* made clear that they saw no difference between the evil of libel and obscenity (p. 737), both offenses were the subject of the Minnesota Statute.

In fact, since *Doubleday & Co.* v. *New York*, 335 U. S. 848 and *Beauharnais* v. *Illinois*, 343 U. S. 250 there is even considerable doubt as to the application of the dicta even as to cases where punishment alone is involved.

But there can be no escape from what was decided in *Near*. The analogy of the offensiveness of the tirades in *Near* to the adjudged obscene in this case is so logical that the conclusion follows that *Near* decides this case. If one

Court in *Near* frustrated such legislative action The *Near* case is therefore an answer to Justice Frankfurter.

The *Beauharnais* case illustrates the point. There, criminal sanction was invoked against the utterance of a libel against a race. The criminal sanction was sustained. Yet in *Near* the suppression of a libel against a race and others by injunction was frustrated by this Court.

(6)

The only issue raised by appellants here and in the courts below is that the statute operates as an unconstitutional prior restraint.

Appellants do not associate themselves with the additional points raised in the brief of the supporting *amicus curiae*. Those points were waived either expressly or implicitly below and in the jurisdictional statement.

On page 42 of "Brief of Appellants" a point is made that there must be a causal connection between the utterance and anti-social conduct resulting therefrom. By this, appellants do not raise any point other than prior restraint. The "causality" argument was made to illustrate that suppression of a book before distribution results in not only denial of the public to appraise, but also prevents study of the effect of the publication on the community.

One last word,—reference was made by the court below and by opposing counsel to the fact that appellants "concede" that the publication is obscene. This is an inadvertence. Appellants merely did not challenge the finding of the trial court and the conclusion of the Court of Appeals that such was the character of the book. In resting appel-